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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. EDUARDO SALAS GARCIA, Defendant and Appellant.	E038044 (Super.Ct.No. FSB45827) O P I N I O N

APPEAL from the Superior Court of San Bernardino County. Marsha Slough, Judge. Affirmed.

John D. Blair-Loy, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Pamela Ratner Sobeck, Supervising Deputy Attorney General, Ivy Fitzpatrick and Scott C. Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

An information was filed charging defendant with one count of making criminal threats to Irma Cano "[o]n or about September 6, 2004." (Pen. Code, § 422;[1] count 1.) A jury found defendant guilty of the charge, and further found he had one prior serious felony conviction, which also constituted a prior strike conviction. (§§ 667, subds. (a) & (b)-(i), 1170.12, subd. (c)(1).) Defendant was sentenced to nine years in prison, and appeals.

At trial, the evidence showed that defendant made two criminal threats to Cano, one on September 6 and the other on September 7, 2004. The jury was instructed that it could convict defendant in count 1 based on either incident, provided it unanimously agreed that at least one of the incidents occurred. Defendant contends his conviction in count 1 violates his constitutional right to notice of the charges against him because, he claims, the September 7 incident was not disclosed at the preliminary hearing. Alternatively, he claims his trial counsel was ineffective for failing to object to the admission of evidence concerning the September 7 incident, and for requesting the unanimity instruction.

Defendant further contends the trial court prejudicially erred in refusing to instruct the jury on the lesser included offense of attempted criminal threats in count 1, and also erred in refusing to take judicial notice of two court minute orders which he claims undermined Cano's claim that defendant's threats placed her in sustained fear. Lastly,

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

defendant contends that, during the jury trial on the prior strike/serious felony conviction allegation, the trial court violated his right to a jury trial and due process by instructing the jury that he was the person identified in the prior conviction records.

We find each of defendant's contentions without merit, and affirm the judgment.

FACTUAL BACKGROUND

A. *Prosecution Evidence*

1. Irma Cano's Testimony

In September 2004, Irma Cano lived on West Spruce Street in San Bernardino. There were two houses on the property, one in front and one in back. Cano lived in the house on the front portion of the property with other family members, including two of her children and two other children. The other house, in the rear portion of the property, was used for storage.

Cano testified that, at approximately 9:00 a.m. on September 6, 2004, she was in the storage house when she heard loud yelling coming from behind the house. She looked out a window and saw defendant standing behind a chain-link fence in her neighbor's yard. The fence was about two meters from the house, and defendant was facing the house.

Cano believed defendant could not see her, because she was peering around a curtain. She testified that defendant said "he had a gun, and he had an AK and he was going to kill us. And he really didn't care if there were children or not. That's why I was very much afraid."

Cano further testified that, on the following morning, September 7, she was again at home alone when a second incident occurred. Again, she heard defendant yelling from the same location, saying "he was going to kill us; that he didn't care about the children," and that "he had an AK; [and] he was watching us." On both occasions, defendant was yelling in Spanish.

Cano did not call the police to report either incident, because she was frightened for herself and the children. But, on the evening of September 7, Cano reported both incidents to the police after her neighbor, Pedro Gutierrez, called the police to report a separate incident involving defendant. Cano later obtained a restraining order against defendant.

2. Pedro Gutierrez's Testimony

Pedro Gutierrez testified that, between 8:00 and 9:00 p.m. on September 7, 2004, he found defendant trespassing in his yard. He asked defendant what he was doing there and "in a good way" asked him to leave, but defendant refused. Defendant yelled at and insulted Gutierrez, telling him he had 'demon eyes" and "was a violator." When Gutierrez told defendant he was going to call the police, defendant responded, "'I don't care. I was in prison for seven years, so I really don't care if I go back. And if I end up going back, I'm going to come back out, and I'm going to hurt you and your family. I'll just kill you.'"

Defendant left for about five minutes and returned with a dog, saying he wanted to fight Gutierrez. Gutierrez again asked defendant to leave, but defendant refused and hit Gutierrez in the face with a T-shirt. The police were called, and Gutierrez reported

defendant's behavior to the police. Defendant was speaking in Spanish when he threatened Gutierrez.

3. Police Officers' Testimony

Officer Christian Flowers contacted defendant during the evening of September 7. 2004. He said defendant was extremely agitated, disrespectful, slightly combative, and uncooperative, and said the police "don't even need to be here." Officer Jesus Vega spoke with Cano that evening. Cano identified defendant as the person who threatened her. Cano appeared nervous and feared retaliation if she spoke to the officers.

B. *Defense Evidence*

Defendant's fiancé, Cirina Gomez, testified that defendant did not know enough Spanish "to yell at somebody in Spanish." In September 2004, Gomez and defendant were staying in the house behind Gutierrez's house.

DISCUSSION

A. *Defendant Received Adequate Notice of the September 6 and 7 Incidents Underlying the Criminal Threats Charge in Count 1*

Defendant contends his conviction for making criminal threats in count 1 violated his right to notice of the charges against him under the Sixth and Fourteenth Amendments. We reject this contention, because Cano's preliminary hearing testimony disclosed that two threats were made, on two separate days, in close proximity to September 6, 2004.

1. Background

In the initial complaint, defendant was charged with two counts of criminal threats against Cano, one occurring "[o]n or about September 6, 2004," and the other occurring "[o]n or about September 7, 2004."

At the preliminary hearing, Cano testified that defendant made criminal threats to her on two different days. She answered "[y]es" when she was asked whether she was at home in the morning "[o]n or about September 6th of this year." She testified that, on that day, she heard someone outside her house "cussing" or "saying that we were going to be killed." From a window where defendant could not see her, Cano looked outside and saw defendant in the backyard of the house behind her, standing behind a fence and facing in her direction. Defendant was saying he "was going to pretty much 'fuck us over,' that he had a gun, and he really wasn't concerned about the family or the children." Cano knew that defendant was talking to her, because there was no one else around and he had done the same thing only one or two days earlier.

When asked whether defendant made another threat "the next day, after the 6th," Cano said, "I just saw him looking over [the fence toward her house]." When asked when defendant made the earlier threat, Cano said she did not recall the date, but she thought it was only "one day or two days before." When asked what happened on the earlier day, Cano said she saw defendant "looking out over" toward her house, from the other side of the fence behind her house, and "saying that he was going to kill us." On the earlier date, Cano said she knew defendant was talking to her because there was no one else around and he was facing in her direction.

No other witnesses testified at the preliminary hearing. Based on Cano's testimony, the trial court held defendant to answer on only one count of making criminal threats. The trial court indicated there was a "deficiency" in the "immediate prospects of execution" of the earlier threat, but, combined with the second threat, there was an "escalation of conduct" and better evidence of an "imminent threat" to support a single charge based on the September 6 incident. Thus, the prosecution filed an information charging defendant with one count of criminal threats, occurring "[o]n or about September 6, 2004."

As discussed, at trial Cano testified that defendant made two criminal threats, one on September 6 and the other on September 7, 2004. Defendant did not object to Cano's testimony concerning the September 7 incident, and requested that the court give a unanimity instruction.[2]

2. Analysis

Defendant claims the September 7 incident was neither charged in the information nor disclosed in Cano's preliminary hearing testimony, and he was therefore "wrongly tried for *two* acts," rather than the single September 6 incident for which he was charged.

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[2] CALJIC No. 17.01 [Verdict May Be Based on One of a Number of Unlawful Acts] instructed the jury that: "The defendant is accused of having committed the crime of criminal threats in Count I. The prosecution has introduced evidence for the purpose of showing that there is more than one act upon which a conviction on Count I may be based. The defendant may be found guilty, if the proof shows beyond a reasonable doubt that he committed any one or more of the acts. However, in order to return a verdict of guilty to Count I, all jurors must agree, that he committed the same act or acts. It is not necessary that the particular act be agreed upon, or be stated on your verdict."

Thus, he argues, his conviction violated his constitutional right to notice of the charges against him. Alternatively, he contends his trial counsel rendered ineffective assistance for failing to object to Cano's trial testimony concerning the September 7 incident, and for requesting the unanimity instruction.

"Both the Sixth Amendment of the federal Constitution and the due process guarantees of the state and federal Constitutions require that a criminal defendant receive notice of the charges adequate to give a meaningful opportunity to defend against them. [Citations.] 'Notice of issues to be resolved by the adversary process is a fundamental characteristic of fair procedure.' [Citation.] 'The "preeminent" due process principle is that one accused of a crime must be "informed of the nature and cause of the accusation." [Citation.] Due process of law requires that an accused be advised of the charges against him so that he has a reasonable opportunity to prepare and present his defense and not be taken by surprise by evidence offered at his trial.' [Citation.]" (*People v. Seaton* (2001) 26 Cal.4th 598, 640-641; see also *People v. Valladoli* (1996) 13 Cal.4th 590, 607; *People v. Ramirez* (2003) 109 Cal.App.4th 992, 999.)

"'[I]n modern criminal prosecutions initiated by informations, the transcript of the preliminary hearing, not the accusatory pleading, affords defendant practical notice of the criminal acts against which he must defend.' (Italics [omitted].) '[A]n information plays a limited but important role: It tells a defendant what *kinds* of offenses he is charged with (usually by reference to a statute violated), and it states the *number* of offenses (convictions) that can result from the prosecution. But the time, place and circumstances of charged offenses are left to the preliminary hearing transcript; it is the touchstone of

due process notice to a defendant.' [Citation.]" (*People v. Butte* (2004) 117 Cal.App.4th 956, 959; see also *People v. Jones* (1990) 51 Cal.3d 294, 317.) "'[A]t a minimum, a defendant must be prepared to defend against all offenses of the kind alleged in the information as are shown by evidence at the preliminary hearing to have occurred within the timeframe pleaded in the information.' [Citations.]" (*Ibid*.)

In accord with these principles, section 1009 provides that an information may not be amended to "charge an offense *not shown by the evidence* taken at the preliminary examination."[3] (Italics added.) However, a variance between the evidence presented at trial to support a charge, and the evidence presented at the preliminary hearing to give notice of the factual basis of the charge, will not be deemed material unless the variance has prejudiced the defendant in preparing and presenting his defense. (*People v. Pitts* (1990) 223 Cal.App.3d 606, 906-907 (*Pitts*), citing *People v. LaMarr* (1942) 20 Cal.2d 705, 711; see also *People v. Jones, supra,* 51 Cal.3d at pp. 317-318.)

Similarly, a variance in the date an offense is alleged to have been committed, and the date or dates testified to at trial, will not be deemed material if it does not prejudice the defendant in preparing and presenting his defense. "The general rule, with respect to proof of the time when an offense is committed, is that there is no fatal variance from the allegation that it was committed on a particular date, to show that it was actually committed on or about or near that date, unless the variance results in misleading the

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[3] Here, the information was not amended to change the alleged date of the alleged criminal threat from "[o]n or about September 6, 2004."

defendant so as to prevent him from making his defense to the charge . . . . [¶] . . . [I]t is sufficient to prove that the crime was committed *at or about the time alleged* . . . ." (*People v. Tracy* (1942) 50 Cal.App.2d 460, 464-465.)

Here, Cano testified at the preliminary hearing that defendant made one criminal threat on September 6, and another only one or two days earlier. At trial, she testified that defendant made one criminal threat on September 6 and another on September 7. Defendant has not explained how this variance in Cano's preliminary hearing and trial testimony prejudiced his ability to prepare and present a defense against the charge of making a single criminal threat "on or about September 6." Nor do we discern any reason why it would have.

Cano's preliminary hearing and trial testimony was consistent regarding the nature and circumstances of the two threats. She testified that on both occasions when defendant threatened her, he was looking toward her house from her neighbor's backyard, saying he was going to kill her and her family. She also consistently testified that the two threats were made only one or two days apart. Her testimony varied only with regard to the *exact dates* on which the two threats were made.

Thus, Cano's trial testimony concerning the September 7 incident did not deprive defendant of his constitutional right to notice of the charge against him. It follows that defendant's trial counsel did not render ineffective assistance, either by failing to object to the testimony concerning the September 7 incident, or in requesting the unanimity

instruction. (*Strickland v. Washington* (1984) 466 U.S. 668, 691-692 [104 S.Ct. 2052, 80 L.Ed.2d 674].)[4]

B. *The Trial Court Properly Refused to Instruct the Jury on the Lesser Included Offense of Attempted Criminal Threats in Count 1*

Defendant contends the trial court erroneously denied his request for instructions on the lesser included offense of attempted criminal threats in count 1. He argues that the jury could have reasonably concluded that he committed the lesser offense, but not the greater, because substantial evidence showed that Cano may not have been placed in

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[4] Defendant argues that *People v. Burnett* (1999) 71 Cal.App.4th 151 (*Burnett*) is "controlling" and "essentially indistinguishable" from the present case. Not so. The court in *Burnett* reversed the defendant's conviction for being a felon in possession of a firearm on the ground the admission of evidence at trial violated his due process right to notice of the factual basis of the charge against him. The evidence presented at the preliminary hearing showed that the defendant possessed a .38-caliber revolver on January 8, 1996; thus, the information charged defendant with possessing a ".38-caliber revolver" on January 8. Before trial, the information was amended to delete the reference to a ".38-caliber revolver," and at trial the prosecution was allowed to present evidence -- not disclosed at the preliminary hearing -- that the defendant possessed a different weapon, a .357 magnum firearm, on January 8. Critically, the evidence at trial showed that the defendant's possession of the .357 magnum occurred in a different location and under entirely different circumstances than the .38-caliber revolver. The .357 magnum incident also involved entirely different witnesses than the .38-caliber revolver incident. (*Id*. at pp. 155-156, 164-165, 168-169.)

The facts of *Burnett* are therefore distinguishable. As discussed, the variance between Cano's testimony at the preliminary hearing and at trial was not material, essentially because it did not prejudice defendant's ability to prepare and present a defense to the charge of making criminal threats on or about September 6, 2004. In *Burnett*, however, the preliminary hearing testimony only concerned the .38-caliber revolver incident; thus, it did not put the defendant on notice that he would have to defend the charge based on the entirely separate .357 magnum incident.

sustained fear as a result of either of his two criminal threats. We conclude that the evidence did not warrant an instruction on the lesser included offense.

Even in the absence of a request, a trial court has a duty to instruct sua sponte on lesser included offenses, "when the evidence raises a question as to whether all of the elements of the charged offense were present [citation], but not when there is no evidence that the offense was less than that charged." (*People v. Breverman* (1998) 19 Cal.4th 142, 154, 162.)[5]

An attempted criminal threat is a lesser included offense of making a criminal threat. (*People v. Toledo* (2001) 26 Cal.4th 221, 230-231.) An attempted criminal threat is committed, for example, where the defendant, "acting with the requisite intent, makes a sufficient threat that is received and understood by the threatened person, but, for whatever reason, the threat does not *actually* cause the threatened person to be in sustained fear for his or her safety even though, under the circumstances, that person reasonably could have been placed in such fear." (*Id*. at p. 231.) A sustained fear is a period of fear that "extends beyond what is momentary, fleeting, or transitory." (*People v. Allen* (1995) 33 Cal.App.4th 1149, 1156.)

Defendant maintains there was substantial evidence that his threats did not cause Cano to be in sustained fear, because she did not call the police after the threats were

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[5] Here the record indicates that defense counsel did not request an instruction on attempted criminal threats, but instead requested an instruction on the lesser *related* offense of disturbing the peace. (§ 415.) Still, the trial court and counsel discussed whether the evidence warranted an instruction on attempted criminal threats.

made. Instead, she reported the crimes to the police only after defendant threatened her neighbor, Gutierrez, during the evening of September 7, and after the police arrived at Gutierrez's house. He argues that, based on Cano's failure to call police, the jury "was free to infer" that his threats did not place her in sustained fear.

On the facts of this case, we disagree. Cano specifically testified that she did not call police because she was frightened for her and the children's safety. Significantly, there was no evidence that Cano had any *other reason* for not calling the police, including that the threats simply did not place her in sustained fear.

Thus, defendant is only speculating that Cano did not call the police because she was not in sustained fear. "'Speculation is an insufficient basis upon which to require the trial court to give an instruction on a lesser included offense.'" (*People v. Sakarias* (2000) 22 Cal.4th 596, 620.)

C. *The Trial Court Properly Refused to Take Judicial Notice of Two Minute Orders From Cano's Restraining Order Case File*

Defendant contends the trial court abused its discretion in refusing to take judicial notice of two minute orders from the court file in which Cano petitioned for a restraining order against defendant. He claims the orders were relevant to impeach Cano's testimony that defendant's threats placed her in sustained fear. We conclude that the orders were properly excluded, because they were self-contradictory and unreliable, and their admission only would have confused the jury (Evid. Code, § 352.)

1. Background

Cano testified that shortly after the September 6 and 7 incidents, she went to court and obtained a restraining order against defendant because she feared for her safety and the safety of the children living in her house. On cross-examination, Cano denied that her petition for the restraining order was dismissed on the ground she failed to appear in court on the matter.

Although no restraining order was introduced into evidence, the record indicates that a temporary restraining order was issued, and that Cano signed a supporting declaration on September 9, 2004. The defense sought to show that Cano's petition for a (permanent) restraining order was dismissed because Cano failed to appear in court on October 14, 2004.

The defense proffered two minute orders from the restraining order case file, both dated October 14, 2004, and both showing a docket time of 8:30 a.m. The orders were patently inconsistent. One order showed that Cano appeared in court on October 14 and that her petition was "continued for service on defendant." The other order showed that Cano did not appear in court, and that her petition was dismissed with prejudice for "failure to prosecute."

The defense asked the trial court "to take judicial notice of the restraining order file" including the two October 14 orders. It argued that the order which showed the case was dismissed due to Cano's failure to appear contradicted Cano's testimony, and tended to negate her claim that defendant's threats placed her in sustained fear.

After considering the matter, the trial court refused to take judicial notice of the two minute orders on the ground they were conflicting and would confuse the jury. The court said: "I think it would be confusing to give the jurors two separate minute orders and ask them to try to make sense of them when they do not have the basic background, training, and experience and foundation on which to make a decision as to which minute order is most probably correct." The court also stated that the orders would cause the jury "to greatly speculate as to what did or did not occur."

2. Analysis

A trial court has broad discretion under Evidence Code section 352 to exclude evidence if its probative value is substantially outweighed by the probability that its admission will confuse the issues or mislead the jury. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.) This discretion extends to excluding evidence of court records which a trial court is statutorily required to judicially notice upon a party's request. (Evid. Code, § 454, subd. (a)(2); *Mangini v. R. J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1063 [discretion to exclude evidence under Evid. Code, § 352 extends to matters which are required to be judicially noticed under Evid. Code, § 450 et seq.].) We apply the deferential abuse of discretion standard in reviewing a trial court's rulings under Evidence Code section 352. (*People v. Pollock* (2004) 32 Cal.4th 1153, 1171.)

Here, the trial court properly refused defendant's request to take judicial notice of the two October 14 minute orders. As the trial court said, the orders were conflicting and therefore very likely to confuse the jury. One order showed that Cano appeared in court on October 14 and that the matter was "continued for service on defendant." The other

order showed that Cano did not appear and that her petition was dismissed for "failure to prosecute." Thus, the orders had very little probative value on the issues of whether -- and if so, why -- Cano failed to appear on court on October 14 to prosecute her petition for a permanent restraining order against defendant.

Defendant further argues that the exclusion of the two minute orders violated his due process right to present a defense, because it deprived him of "a strong attack on a pillar of the prosecution's case." "As a general matter, the '[a]pplication of the ordinary rules of evidence . . . does not impermissibly infringe on a defendant's right to present a defense.' [Citation.]" (*People v. Fudge* (1994) 7 Cal.4th 1075, 1102-1103.) Indeed, "excluding defense evidence on a minor or subsidiary point does not impair an accused's due process right to present a defense." (*Id*. at p. 1103.)

Here, the orders related to a minor or subsidiary point of evidence, not a "pillar of the prosecution's case." As discussed, the orders were conflicting and thus had very little probative value concerning whether -- and if so, why -- Cano failed to appear in court on October 14. The orders had even less probative value concerning whether Cano was in sustained fear five weeks earlier, that is, on and shortly after September 6 and 7, when the threats were made. Thus here, the exclusion of the orders from evidence did not impermissibly infringe upon defendant's right to present his defense.

D. *Defendant Did Not Have a Right to a Jury Trial on Whether He Was the Person Identified in the Prior Conviction Records*

Defendant contends that, during the bifurcated jury trial on his prior strike/serious felony conviction, the trial court impermissibly removed the "identification issue" -- that

is, whether defendant was the person identified in the prior conviction records -- from the jury's consideration. He argues that this violated his Sixth and Fourteenth Amendment rights to a jury trial and due process. We reject this contention.

1. Background

At trial on defendant's prior conviction allegation, defendant objected to the trial court deciding the "identification issue" -- that is, whether defendant was the person named in the prior conviction records, and asked that the jury be allowed to determine the issue. (§ 1025.)[6] The trial court denied the request and determined that defendant was the person identified in the prior conviction records. After evidence was presented to the jury concerning the fact of the prior conviction allegation, the trial court instructed the jury: "You are instructed that the defendant is the person who's [*sic*] name appears on the documents admitted to establish[] the [fact of the] prior conviction." The jury then found the prior conviction allegation true.

2. Analysis

Defendant acknowledges that, under current U.S. Supreme Court precedent, he does not have a Sixth Amendment or due process right to a jury trial on "the fact of a prior conviction." (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435] (*Apprendi*) ["*Other than the fact of a prior conviction*, any fact that

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[6] Section 1025, subdivision (b) affords a criminal defendant a statutory right to a jury trial on "the question of whether or not the defendant has suffered the prior conviction." Subdivision (c), however, provides that notwithstanding subdivision (b), "the question of whether the defendant is the person who has suffered the prior conviction shall be tried by the court without a jury."

increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury" (italics added)]; *Almendarez-Torres v. United Sates* (1998) 523 U.S. 224, 228-235, 243 [118 S.Ct. 1219, 140 L.Ed.2d 350] (*Almendarez-Torres*).) Defendant argues, however, that the high court appears likely to reconsider its decision in *Almendarez-Torres*, upon which the rule of *Apprendi* is based.

Defendant notes that, in *Apprendi*, the high court explained its decision in *Almendarez-Torres* as follows: "Because Almendarez-Torres had admitted the three earlier convictions for aggravated felonies - all of which had been entered pursuant to proceedings with substantial procedural safeguards of their own - no question concerning the right to a jury trial or the standard of proof that would apply to a contested issue of fact was before the Court. . . . Both the certainty that procedural safeguards attached to any 'fact' of prior conviction, and the reality that Almendarez-Torres did not challenge the accuracy of that 'fact' in his case, mitigated the due process and Sixth Amendment concerns otherwise implicated in allowing a judge to determine a 'fact' increasing punishment beyond the maximum of the statutory range." (*Apprendi, supra,* 530 U.S. at p. 488.)

Defendant further notes that, in a concurring opinion in *Shepard v. United States* (2005) 544 U.S. 13, 27-28 [125 S.Ct. 1254, 161 L.Ed.2d 205], Justice Thomas observed: "[T]his Court has not yet reconsidered *Almendarez-Torres* . . . which draws an exception to the *Apprendi* line of cases for judicial factfinding that concerns a defendant's prior convictions. . . . [¶] *Almendarez-Torres* . . . has been eroded by this Court's subsequent Sixth Amendment jurisprudence, and a majority of the Court now recognizes that

Almendarez-Torres was wrongly decided. . . . The parties do not request it here, but in an appropriate case, this Court should consider *Almendarez-Torres'*[s] continuing viability."

The question defendant raises is whether section 1025, subdivision (c) should be held to violate a criminal defendant's due process and Sixth Amendment right to a jury trial. In other words, in a trial to determine the truth of a prior conviction allegation, does a criminal defendant have a constitutional right to have the jury, not the court, determine the "identification issue" -- that is, whether the defendant is in fact the person who suffered the alleged prior conviction?

In *People v. McGee* (2006) 38 Cal.4th 682, 686 (*McGee*), our state Supreme Court recently held that a criminal defendant does not have a federal constitutional right to a jury trial on the issue of whether an alleged prior conviction constitutes a qualifying prior conviction, for purposes of increased punishment. The *McGee* court reasoned that the factual inquiry involved in examining the record of the prior criminal proceeding -- for the purpose of determining whether the prior conviction constitutes a qualifying prior conviction -- "is a task for which a judge is particularly well suited and is quite different from the type of factual inquiry—assessing the credibility of witnesses or the probative value of demonstrative evidence—ordinarily entrusted to a jury." (*Ibid*.)

The *McGee* court also noted that, "[a]lthough we recognize the possibility that the high court may extend the scope of the *Apprendi* decision in the manner suggested . . . we are reluctant, in the absence of a more definitive ruling on this point by the United States Supreme Court, to overturn the current California statutory provisions and judicial precedent that assign to the trial court the role of examining the record of a prior criminal

proceeding to determine whether the ensuing conviction constitutes a qualifying prior conviction. . . ." (*McGee*, *supra*, 38 Cal.4th at p. 686.)

The factual inquiry underlying the identification issue -- whether the defendant is in fact the person identified in the prior conviction records -- is, like the factual inquiry involved in examining the record of a prior conviction, a task for which a judge is particularly well suited. And, until the U. S. Supreme Court issues a definitive ruling extending the right to a jury trial to such factual inquiries, we, too, are reluctant to do so.

DISPOSITION

The judgment is affirmed.

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/s/ King
J.

We concur:

/s/ Richli
Acting P.J.

/s/ Gaut
J.